

Before the
Federal Communications Commission
Washington D.C. 20554

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DEC 3 - 1996

Federal Communications Commission
Office of Secretary

In the Matter of Amendment)
of Part 90 Concerning)
the Commission's Finder's)
Preference Rules)

WT Docket No. 96-199

To: The Commission

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REPLY COMMENTS OF
AIRTOUCH PAGING AND NATIONWIDE PAGING, INC.

AirTouch Paging and its affiliates ("AirTouch") and
Nationwide Paging, Inc. ("NPI"), by their attorneys, and
pursuant to Section 1.429 of the Commission's Rules,^{1/}
respectfully submit their Reply to the Comments and
Oppositions filed with respect to the Notice of Proposed
Rule Making (the "Notice") released September 27, 1996 in
the above captioned proceeding. The following is
respectfully shown:

Introduction and Summary

1. The Commission's tentative conclusion in the
Notice that the finder's preference program be eliminated
was supported by several commenters with significant
interests in Part 90 spectrum. There is also a consensus
among the commenters that the finder's preference program is
contrary to the public interest when used to award licenses
for services in which geographic licensing is in place, or

^{1/} 47 C.F.R. § 1.429.

for which geographic licensing has been proposed.

Predictably, a number of commenters who have filed applications as "finders" object to any retroactive change in this program, on the premise that "finders" will be harmed.^{2/} Additionally, some other commenters argue that the finder's preference program or some similar compliance mechanism is still necessary for services which are licensed on a single site basis.

2. AirTouch and NPI (collectively the "Joint Commenters") urge the Commission to conclude that any continuation of the finder's preference program, whether to monitor services licensed on a single site basis, or merely to process pending finder's applications, is contrary to the public interest and results in an ineffective use of the Commission's scarce resources. Furthermore, eliminating the finder's preference program is consistent with the Budget Act of 1993's goal of achieving regulatory parity between services previously classified as common carrier or private but now classified as Commercial Mobile Radio Services ("CMRS").^{3/} As the Commission has concluded in previous proceedings, comparable regulatory treatment for all CMRS

^{2/} 43 commenters filed substantially identical comments in which their pending applications in the finder's preference program are identified and their opposition to dismissal of those pending applications is outlined. (Hereinafter, "Finder's Comments").

^{3/} 47 U.S.C. §332.

providers creates a level playing field and promotes competition among substitutable wireless services.

The Finder's Preference Program Disserves the Public Interest when Licenses are Geographic in Scope

3. There is general consensus among the commenters that the finder's preference program should be eliminated for services licensed by geographic area, or for which geographic area licenses have been proposed.^{4/} As the Joint Commenters and Nextel explained auctions are becoming the predominant mechanism for awarding licenses. The Commission has concluded that auctions place licenses in the hands of parties who value them most highly and are motivated to make substantial use of the spectrum to introduce service promptly.^{5/} Consequently, the finder's preference program, originally intended to ferret out non-compliance with FCC construction obligations and reward such effort with a

4/ See e.g., Comments filed by Nextel, p. 3; (hereinafter "Nextel"); Comments filed by AirTouch/NPI, p. 5-9 (hereinafter "AirTouch/NPI").

5/ AirTouch/NPI pp. 5-6; Nextel, pp. 4-5. The Joint Commenters believe, however, that additional obligations are necessary to ensure licenses are awarded to those who will value them most highly and serve the public interest. AirTouch for instance has proposed build-out and service requirements as additional protections against the warehousing of spectrum.

license, is no longer useful in services licensed by auctions.^{6/}

4. When licenses are awarded by auction, the finder's preference program is contrary to the public interest. Permitting finder's to continue to obtain spectrum for free detracts from the ability to recover the value of that spectrum for the public.^{7/} In addition, the program discourages participation in market area licensing. Market area licensing is intended to provide the resultant geographic licensee with rights to the spectrum within the relevant market, including the right to spectrum forfeited by grandfathered licensees.^{8/} In other words, the geographic licensee should be treated as the "finder" for all spectrum which is returned by the incumbent licensee.^{9/} Permitting other "finders" to obtain the right to spectrum within the geographic licensee's market, thereby interfering with the licensee's market area system rights, would

6/ AirTouch/NPI, p. 7; Nextel, p. 4-5 (As Nextel points out, geographic licenses will contain construction deadlines which must be met in order to retain the license. Having paid substantial sums of money for geographic area licenses, licensees have ample incentive to self-police compliance with these deadlines.).

7/ AirTouch/NPI p. 8.

8/ AirTouch pp. 8-9; Nextel, p. 3.

9/ As the Joint Commenters pointed out in their original comments, it is unclear how the current finders program would even operate in this environment.

introduce confusion and uncertainty into the licensee's plans.^{10/} This result disserves the public interest because it deters the development of a geographic licensing environment.

**The Costs of the Finder's Preference
Program Outweigh the Benefits**

5. The finder's preference program is no longer necessary to monitor compliance with the Commission's construction and operation requirements. As demonstrated by the Joint Commenters and Nextel, where licenses are awarded by auction, geographic licensees have sufficient incentives to self-police compliance of the incumbent licensees with their construction obligations.^{11/} With respect to services for which geographic area licensing has not yet been implemented, or in which such a licensing scheme has not been proposed, compliance monitoring can be adequately

^{10/} Nextel, p. 4; SMR Advisory Group, L.C., pp. 4-7.

^{11/} See discussion infra. As mentioned earlier, the geographic licensee would act as the finder with respect to a failure of the incumbent to meet its obligations, because whatever territory the incumbent failed to construct would automatically become the geographic licensees area.

handled by the Commission.^{12/} Consequently, no need exists for the finder's preference program to continue.

6. There exists ample record evidence that the costs of the program also fail to justify its continued application. Even commenters who believe that the program has benefits bemoan the inefficiency of and delay associated with the program.^{13/} These problems have been exacerbated by the numerous frivolous applications which clog the system and produce a significant drag on the review and compliance process.^{14/} Finally, the most serious costs of the finder's preference program are the hidden costs. When a program calls into question the continuing validity of a license, licensees are hesitant to continue to invest in and develop that system.^{15/}

7. Several parties suggest that redefining the standards, or replacing the oversight body would streamline

^{12/} See e.g., Amendment of the Commission's Rules to Provide Exclusivity to Qualified Private Paging Systems at 929-930 MHz, PR Docket No. 93-35, 8 FCC Rcd 8318, 8323 (1993) (wherein the Commission concludes that intrusive regulations to ensure provision of service is unnecessary because the capital requirements and customers provide sufficient incentive for exclusive licensees to eliminate gaps in their coverage.)

^{13/} PCIA p, 4; SMR Won, p. 2; Advanced Electronics, p. 3; Motorola, p. 5.

^{14/} Nextel, p. 5-7.

^{15/} AirTouch/NPI, p. 10; SMR Won, p. 5.

the process.^{16/} However, given the lack of clear standards,^{17/} the multitude of frivolous applications, and ambiguity of the program's application to geographic area licensing scheme, the costs, delays and inefficiency associated with the finder's preference program will inevitably continue to be experienced.^{18/} The significant costs and problems associated with the finder's preference program argue more strongly for the program's timely elimination than for late retooling.

Dismissal of Pending Applications is Not Inequitable

8. Commenters with pending applications seem to be seeking a guaranteed reward for the efforts and expenditures they incurred in filing finder's preference applications. They argue that a substantial injury would occur if their pending applications are not processed, and that this

^{16/} PCIA, p. 4; Industrial Telecom Assoc. p. 9 One commenter suggests that oversight of the program should be transferred to a frequency coordinator. Comments of Industrial Telecommunications Association ¶ 17. While this proposal may address the paperwork bottleneck, the underlying confusion and uncertainty for applicants and license holders would remain.

^{17/} AirTouch/NPI, pp. 9-10.

^{18/} It is also not clear that the Commission can delegate the authority to terminate authorizations or even investigate purported wrongdoing. Both of these powers are inextricably tied to the Commission's authority to grant licenses.

"injury" can be alleviated by continuation of the program.^{19/} This argument is flawed.

9. The history of frivolous applications and non-meritorious filings belie the "sure success" that these finders insinuate will be theirs if the program is continued. More likely, a fair number of pending applications will not yield dispositive license preferences. Since this is a risk accepted by any filer, it is disingenuous to classify these expenditures as harm caused by the proposed ruling.^{20/}

10. Rather than being a waste of time and scarce Commission resources, the information garnered by these finders could give them an advantage in a competitive bidding situation.^{21/} This advantage is an incentive which is compatible with, not counter to, the auction process. Although several commenters continue to oppose the auction

^{19/} See e.g., "Finder's Comments"; Comments filed by Mobile Communications Services of Miami p. 3; Comments filed by Neches Communications Inc.; Comments of Kenneth Carlson et al.; Comments of Industrial Telecommunications Association, Inc.; Comments of Kelly Communications Inc.

^{20/} The finders also fail to realize the costs being borne by the current licensees to defend against frivolous filings. The Commission could eliminate the program based solely upon the percentage of finders preferences actually awarded versus the cost to defend suffered by the existing licensees.

^{21/} If, for example, the finder knew that an incumbent had failed to actually construct facilities and the other bidders did not, the finder would be able to bid a higher amount for the spectrum.

process as harmful in and of itself, this issue is outside the scope of the present rule making procedure.^{22/} Success is no more guaranteed in the finder's preference program than in an auction.^{23/}

11. In addition, the current processing freezes with respect to new applications in effect for the 800 MHz and 900 MHz SMR services, and 929 MHz paging services, render meaningless a finder's application to reestablish a recovered channel. Applications for new facilities by finders would not be acceptable for filing.

^{22/} Opposition to the elimination of the finder's preference program appears to be grounded in some instances in a desire to avoid the auction program altogether. See e.g., Comments of Kelly Communications p.2.; Comments of SMR Won, p. 6; "Finder's Comments". To the extent that the Commission allows these finders to circumvent the bidding process, uncertainty and under-valuing of markets will be encouraged. Tolerating alternative licensing opportunities will undercut incentives for efficient spectrum use which are inherent in the auction process.

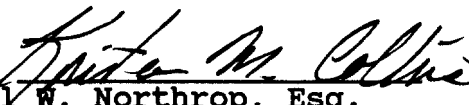
^{23/} Merely having a pending finder's preference application does not create a vested right per se which would be trammled by a change in the program. This should be distinguished from the right to unused or unconstructed spectrum which accrues to a geographic area license holder.

CONCLUSION

WHEREFORE, the foregoing premises having been duly considered, the Joint Commenters respectfully request that the Commission eliminate the finder's preference program and dismiss all pending finder's preference applications consistent with the comments filed by the Joint Commenters.

Respectfully submitted,

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